STANDARD CHARTERED BANK MALAYSIA BERHAD

v.

ENG SONG HUAT

HIGH COURT MALAYA, KUALA LUMPUR
DATO' KAMALANATHAN RATNAM JC
[SUIT NO. D5-22-430-94]
4 NOVEMBER 1995

CIVIL PROCEDURE: *Summary judgment - Delay in filing application - Explanation - Whether to be explained in supporting affidavit - Explanation given orally from the Bar - Whether acceptable - Unexplained delay - Whether by itself sufficient to set aside judgment - Merits of case - Whether to be considered - Rules of High Court 1980 O. 14.*

CIVIL PROCEDURE: *Summary judgment - Loan agreement - Liability of guarantor - Notice of demand - Whether served - Failure to endorse proper address of guarantor in writ and notice of demand - Whether a triable issue - Rules of the High Court 1980 O. 14.*

This was an appeal by the defendant against an order of the Senior Assistant Registrar giving judgment to the plaintiff on an O. 14 application. The facts were that the defendant stood guarantor for a certain loan given by the plaintiff to Springdale Industries Sdn. Bhd. (the borrower). Pursuant to the guarantee, the defendant created a debenture and charged a piece of land to the plaintiff. Upon default by the borrower, the plaintiff disposed of the land. The proceeds however were insufficient to meet the loan sum, and so, on 30 April 1994, the plaintiff filed a writ and statement of claim to recover the balance sum. The defendant, having entered appearance on 29 May 1994, filed his defence on 8 July 1994.

On 21 July 1994, the plaintiff applied to change its name from Standard Chartered Bank to Standard Chartered Bank Malaysia Berhad, and on 5 September 1994, obtained the relevant order for substitution. Following that, on 7 September 1994, the plaintiff filed the application for summary judgment together with an affidavit in support, and on 29 June 1995, the Senior Assistant Registrar gave judgment for the plaintiff.

The defendant contended that there had been an undue delay in the filing of the O. 14 application, and secondly, that the notice of demand had not been served on him. The facts showed that the plaintiff's supporting affidavit did not mention anything about the delay. Before the learned Judicial Commissioner, however, the plaintiff sought to explain the delay from the Bar attributing the delay to the application to substitute its name aforesaid. The primary questions that arose were:

(1) Whether the plaintiff, in the circumstances, ought to be allowed to explain the delay from the Bar.

(2) Whether the defendant, by their contentions, had raised any triable issue.

Held:

[1] Since the statement of claim was filed on 30 April 1994 and appearance entered on 28 May 1994, the plaintiff ought to have filed their O. 14 application soon after their appearance has been entered.

[2] In the affidavit in support of the O. 14 application, the plaintiff had not explained why the application was filed two months after the defence was filed on 8 July 1994. This is fatal as unexplained delay, by itself, is a sufficient ground to set aside a summary judgment without the need to consider the merits of the case.

[3] The Court cannot accept the oral explanation from the Bar by Counsel for the plaintiff. Allowing Counsel to explain controversial matters from the Bar is akin to shutting out the opponent from the right to challenge such statement. This apart, reliance on affidavit was placed only in respect of an affidavit affirmed in support of another application to substitute the name of the plaintiff. The Court, in the circumstances, could only hold that the plaintiff has failed to give a sufficient or cogent explanation for the delay.

[4] There was merit in the contention of the defendant that the notice of demand had not been served on him. A perusal of the Court file showed that no affidavit of service had been filed, and on top of that, the plaintiff had not showed in their loan agreement or anywhere in their affidavit, the correct address of the appellant. Further, no evidence has been led as to whether the address endorsed on the writ was that of the defendant's or was the proper address to which the notice of demand ought to have been sent. In the circumstances, a triable issue had been raised with regard to the service of the notice of summons.

[Judgment of SAR set aside. Defendant given leave to defend action]

Cases referred to:

Abdul Manaf Mohd bin Ghows & Ors. v. Nusantara Timur Sdn. Bhd. & Ors. [1994] 2 CLJ 379; [1994] 2 MLJ 180 ***(foll)***

Krishnamurthy & Anor. v. Malayan Finance Corp. Bhd. [1986] 2 MLJ 134 ***(foll)***

Ng Hee Thoong & Anor. v. Public Bank Bhd. [1995] I CLJ 609 ***(foll)***

Hsu Seng v. Chai Soi Fua [1980] 1 MLJ 300 ***(not foll)***

Public Bank Bhd. v. Malamaju Enterprise Sdn. Bhd. & Anor. [1989] 2 MLJ 112 ***(fo11)***

Borneo Housing Mortgage Finance Bhd. v. Ngu Kil Cho & Anor. [1991] 3 CLJ 2848 ***(cit)***

Amanah Merchant Bank Bhd. (formerly known as Amanah Chase Merchant Bank Bhd.) v. Lim Tow Choon (through Official Assignee) [1994] 2 CLJ I ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(e)
Rules of the High Court 1980, O. 14

For the plaintiff - KL Wong; M/s. Nik Hussain & Partners
For the defendant - Sekar; M/s. Sault & Co.

JUDGMENT

Kamalanathan Ratnam JC:

This is an appeal by the defendant against an order of the Senior Assistant Registrar giving judgment to the plaintiffs on an O. 14 application on 29 June 1995.

The plaintiffs granted a loan to one Springdale Industries Sdn. Bhd. for a sum of RM1,000,000 with interest pursuant to a loan agreement. The defendant/appellant herein was a guarantor on the usual terms. In addition to creating a debenture the defendant also charged a piece of his land to the plaintiff. Since the borrower had failed to pay the loan the plaintiffs sought recovery through the O. 14 application against the defendant for the balance sum after disposing of the land referred to earlier to set off the loan and accrued interest. The writ and statement of claim was dated 30 April 1994, and filed on the same day. Appearance was entered for the defendant on 28 May 1994, and the defence filed on 8 July 1994.

An application was made by the plaintiffs on 21 July 1994, to change the name of the plaintiffs from Standard Chartered Bank to Standard Chartered Bank Malaysia Berhad pursuant to O. 15 r. 7 of the Rules of the High Court 1980. The need for the change of name was because on 28 April 1994, the High Court in Kuala Lumpur had *vide* originating summons No. D3-24-88-94 ordered that all assets, liability and property in the name of Standard Chartered Bank be transferred to Standard Chartered Bank Malaysia Berhad as of 1 July 1994. Upon obtaining the said order the plaintiffs herein filed the O. 14 application for summary judgment on 7 September 1994, and an affidavit in support dated 7 September 1994, (Enclosure 7). This defendant replied *vide* his affidavit dated 28 February 1995, (Enclosure 13).

Before me Mr. Sekar for the appellant confined his appeal to two issues. He argued that there was inordinate delay in filing the O. l4 application. There was a delay of 2 months and he relied on *Abdul Manaf Mohd bin Ghows & Ors. v. Nusantara Timur Sdn. Bhd. & Ors.* [1994] 2 MLJ 180. In that case Annuar J (as His Lordship then was) relied on *Krishnamurthy & Anor. v. Malayan Finance Corp. Bhd.* [1986] 2 MLJ 134 wherein the then Supreme Court held at p. 135:

> In the second place the law as to the time when an application for an O. 14 judgment could be made is settled law. The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the Court no O. 14 judgment could be signed.

Annuar J (as His Lordship then was) said at p. 184 in *Abdul Manaf:*

> Now with hindsight and on re-reading carefully the affidavits filed on behalf of the plaintiff is in support of their application for summary judgment under O. 14 of the Rules of the High Court 1980, 1 have not been able to find any explanation for the delay of some two months in making the application. As the appearance was entered on 28 March 1990, the application should have been made shortly after that. Since the plaintiffs did not explain in their affidavits the delay in making their application after the delivery of defence, I am, guided by *Krishnamurthy's* case, constrained to hold that summary judgment should not be entered.

Mr. Wong for the respondent replied regarding delay by agreeing with the proposition of the law enunciated in *Krishnamurthy.* He argued that the need for an explanation would arise if the application for summary judgment was filed after the delivery of the defence.

In this case, he says, the delay has been explained because the plaintiff had to file an application to substitute its name from Standard Chartered Bank to Standard Chartered Bank Malaysia Berhad. The plaintiffs contended that they obtained this order for substitution on 5 September 1994, and soon thereafter, i.e. on 7 September 1994, they filed for summary judgment. There was therefore, they argued, a delay of 2 days only.

In any event it was the contention of the plaintiffs that even if there was a delay, the Court ought to consider if there are merits in the defence.

With regard to the question of delay I find that since the statement of claim was filed on 30 April 1994, and appearance entered on 28 May 1994, the plaintiff ought to have filed their O. 14 application soon after their appearance has been entered (following *Krishnamurthy).*

However looking at Enclosure 8 which is the affidavit in support of the O. 20 application I see no explanation given as to why this application was filed 2 months after the defence was filed on 8 July 1994. What ever explanation that has been proffered by the plaintiffs an explanation from the Bar by Mr. Wong.

In *Ng Hee Thoong & Anor. v. Public Bank Bhd.* [1995] 1 CLJ 609 Gopal Sri Ram JCA has this to say at p. 615 on a similar situation.

> I have carefully perused the affidavit filed by the respondent in support of its summons for the judgment (which is the only affidavit delivered by it) but have been unable to discover any such explanation as that alluded to by the learned

> Judicial Commissioner. The only reference to the delay point is to be found in the address of Counsel for the respondent in the Court below and the explanation is in reality that of Counsel and not of his client under oath. It is a principle fundamental to our system of adverbial litigation that evidence upon a matter must be given on oath. The practice of Counsel giving evidence from the Bar, as was done in this case, is to be deprecated. To act, as the learned Judicial Commissioner did in this case is to ignore the very basic tenets of the law of evidence that is applied by our Courts. Here was a positive assertion on oath by the appellants that there had been inordinate delay. The proper way in which that was to be met was by way of an affidavit in answer, explaining the delay. Once this is done, then it is up to the judicial arbiter to accept or reject the explanation proffered. But to ride roughshod over such an important point, as was done here, does little to advance the course of justice according to the law.

His Lordship went further and himself relied on the judgment of another eminent Judge. He continued on p. 616:

> It follows from what Abdoolcader J has said that whenever there is a delay, it is for the plaintiff in the first place to give an explanation for it in the usual way, that is, by affidavit, even before the point is taken by the other side.

Since whatever explanation for the delay was given by Counsel orally and reliance was placed on an affidavit in support of another application to substitute the name of the plaintiffs, I hold that the plaintiffs has failed to give sufficient, cogent explanation for the delay. I was referred by Counsel for the respondent to *Hsu Seng v. Chai Soi Fua* [1980] 1 MLJ 300 where Haidar J expressed the view that as the facts pertaining to the delay were within the personal knowledge of Counsel, the oral explanation for the same could be accepted by the Court although ideally such explanation should be by affidavit to enable the other party if he wishes, to challenge the facts relied on.

I am bound by the principle of *stare decisis* to adopt and uphold the decision or Gopal Sri Ram JCA in *Ng Hee Thoong & Anor.* Speaking for myself I would totally accept the views of the appellate Judge because allowing Counsel to explain controversial matters from the Bar is akin to shutting out the opponent from a right to challenge such statements and condonation of such a stand by the Court would be tantamount to lifting the lid off the proverbial Pandora's Box.

As to whether the question or delay alone could be sufficient to warrant setting aside the judgment and to give leave I am guided by the decision of Abdul Malek J in *Public Bank Bhd. v. Malamaju Enterprise Sdn. Bhd. & Anor.* [1989] 2 MLJ 112, 114 wherein His Lordship said:

> Concerning the appeal by the fourth and sixth defendants, the plaintiffs had applied for the final judgment against the second, fourth and sixth defendants by way of summons-in-chambers filed on 6 November 1987. The fourth and sixth defendants had in fact filed their joint statement of defence on 28 July 1986 and there had been no explanation from the plaintiffs as to the 16 month delay in

filing their application except for para 11 in Enclosure 33 where the plaintiffs averred on the time taken for foreclosure proceedings. On the unexplained delay alone, the Court had the power to set aside the order for final judgment if it thought it fit.

The next issue taken by the appellant is that the notice of demand was not served on him. I was referred to the writ of summons and to the notice of demand that was allegedly sent by the plaintiff's solicitors, M/s Nik Hussain & Partners dated 5 April 1994, to the appellant and which was specially denied in the defence. In support of the O. 14 application this Notice of Demand was exhibited and it showed 2 addresses:

(a) c/o 3461, Hilir Garden Ujong Pasir 75050 Melaka

and

(b) c/o Jeuro Development Sdn. Bhd. 588 1st Floor Taman Melaka Raya 75050 Melaka

The plaintiffs have also shown that these 2 letters were sent to the above addresses by exhibiting their solicitors' postage record. However the loan agreement that has been exhibited and which shows details of the guarantor significantly makes no reference to any address of the appellant. In fact other than merely stating his name and identity card number, the guarantee signed by both parties and stamped, gives no address of the appellant.

However, the said fixed Loan Agreement which has been exhibited gives the addresses of both the lender and the borrower. Mr. Sekar then argued that a notice of demand was not served on the appellant.

In reply to this point, Mr. Wong contended that the defence is a mere denial and that the appellant ought to have descended to particulars. He argued that the appellant ought to assert that he was no longer residing at that address and that failure to assert raised the presumption under s. 114(e) of the Evidence Act 1950.

Section 114(e) reads:

114. The Court may presume:

...

(e) that judicial and official acts have been regularly performed

This presumption was raised by Tuan Syed Ahmad Idid JC (as His Lordship then was) in *Borneo Housing Mortgage Finance Bhd. v. Ngu Kil Cho & Anor.* [1991] 3 CLJ 2848 which case was relied upon by the respondents. With respect a case more on point would be the *Amanah Merchant Bank Bhd. (formerly known as Amanah Chase Merchant Bank Bhd.) v. Lim Tow Choon (through Official Assignee)* [1994] 2 CLJ 1, 4, 5 SC wherein Mohamed Dzaiddin bin Hj Abdullah SCJ said:

a In the light of the meaning of the word 'post' stated above, it follows that a notice which is sent by post, whether registered or not, is still 'posted' in the ordinary sense of the word, and in the instant case, the fact that the notice of demand was sent by AR registered post would not make any difference since registration is merely one way of sending a letter. It must, however, be borne in mind that the mode of service of a notice of demand in a given case will depend b on the words of the relevant clause in the guarantee, as it is quite common for the guarantee to expressly provide the manner in which a notice is to be given to the guarantor. See *Cooperative Central Bank Ltd.* and *MBf Finance Bhd.* where, in both cases, the notice of demand was required to be sent by registered post. Or there may be instances where a clause in a guarantee may provide the c mode of service by prepaid AR registered post. Be that as it may, the practical effect of sending a letter by registered post is quite apparent. It provides evidence of the posting and in the case of AR registered post, to borrow VC George J's words, 'it is just a sophisticated version of the ordinary registered post'.

Therefore, on the proper construction of Clause 17, since any notice may be served by sending the same through the post addressed to the last known d address of the addressee, in our view, the deeming provision applies to the said notice, whether or not it is sent by AR registered post. Clause 17 does not provide that the notice should either be sent by registered post or AR registered post, and the fact that these words were omitted from Clause 17 cannot justify the Court reading those words in Clause 17 as was done by the learned Judge. e In the context of Clause 17 of the said guarantee, we are further of the view that it is not necessary that the appellant must show that the AR card has been returned duly acknowledged to constitute effective service of the notice of demand. It is sufficient for the appellant to show that the notice was correctly addressed, prepaid and delivered to the post office and acknowledged for service by the postal authority. Once these facts have been established, the deeming f provision will inevitably apply.

Many authorities were cited to me by learned Counsel for the respondents suggesting that the appellant ought to condescend to particulars.

I invited both parties to refer to the address endorsed on the writ which stated g the defendant/appellant's address as:

No. 3461, Hilir Garden,
Ujong Pasir,
75050 Melaka

h and sought submissions from both parties if this would be sufficient to suggest that the defendant appellant was served at the correct address since this address was one of the addresses stated in the demand notice.

The appellant contended that the summons was not served at this address. A perusal of the Court file shows that no affidavit of service has been filed and i that appearance was entered on 28 May 1994, by the present solicitors for the appellant.

I hold that the decision in *Amanah Merchant Bank* would have bound me had the respondent been able to show in their fixed loan agreement or anywhere in their affidavit the correct address of the appellant.

No evidence has been led as to whether this address:

> No. 3461, Hilir Garden,
> Ujong Pasir,
> 75050 Melaka

was the proper address to which the notice of demand ought to have been sent. In the circumstances I further hold that the appellants have further raised a triable issue with regard to the service of the notice of summons.

I am of the opinion that I need not look at the merits of the case. Suffice it to say that on the issue of delay and notice of demand, the appellants have satisfied me that this case ought to go for trial.

The judgment of the Senior Assistant Registrar dated 29 June 1995 is hereby set aside with costs and leave is hereby given for the defendant to defend this action. The Court will fix an early date for the hearing of this case.

Reported by W.A. Sharif